

Nebraska Law Review

Volume 59 | Issue 1

Article 3

1980

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Recommended Citation

Theodore J. Schneyer, *Limited Tenure for Lawyers and the Structure of Lawyer-Client Relations: A Critique of the Lawyer's Proposed Right to Sue for Wrongful Discharge*, 59 Neb. L. Rev. (1980)

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By Theodore J. Schneyer*

Limited Tenure For Lawyers and the Structure of Lawyer-Client Relations: A Critique of the Lawyer's Proposed Right to Sue for Wrongful Discharge

I. INTRODUCTION

House counsel in corporate legal departments and associates in law firms are employees at will. They may be fired with impunity. Professor Kalish proposes, however, that these lawyers be given a limited form of tenure—a tort claim against the employer when they are fired for disloyalty because they insist upon upholding a professional norm that serves to protect the integrity of the legal system. For example, house counsel who is fired for refusing to follow a corporate executive's instruction to make unmeritorious motions in order to wear down an adversary in litigation would presumably be entitled to sue his former employer for wrongful discharge. Delaying a trial merely to harass an adversary violates Disciplinary Rule (DR) 7-102(A)(1) of the American Bar Association Code of Professional Responsibility (Code), as adopted in most states, and the rule clearly protects against abuse of the judicial process.¹

Professor Kalish's proposal might be supported on two

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1. ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANONS, No. 7, DR 7-102(A)(1) (1978):

(A) In his representation of a client, a lawyer shall not:

(1) File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

grounds. The first is equity; when a lawyer is fired for complying with ethical or legal precepts, it seems unfair to leave the lawyer to bear whatever dislocating effects result. A second argument in support of the proposal is that privately employed lawyers should be more effectively prevented from breaching ethical responsibilities than they are by professionalization and the threat of professional discipline alone. As an added preventive measure, those who employ these lawyers should be specially discouraged from pressing them to commit improprieties by implicitly or explicitly threatening their jobs.²

Try as I might, I can think of no telling objection to these arguments or to the basic concept of limited tenure. Indeed, I rather like the idea and have found it useful for sorting out some of my assumptions about relations between lawyers and their employers. But while I find the proposal intriguing and worthy of further consideration, I am less than completely satisfied with the analysis that supports it. I shall comment critically on five aspects of that analysis.

II. THE PROBLEM TO WHICH LIMITED TENURE IS A DESIRABLE RESPONSE

To begin with, Professor Kalish's remarks leave me uncertain as to the precise problem to which his proposal is addressed. He makes much of lawyers caught in a cross-fire between professional and distinctively organizational expectations. But as I shall explain, I find the proposal most understandable and defensible as a response to a simple problem in lawyer-client relations—the prob-

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2. In recent years several commentators have suggested a different method for providing private house counsel or even all corporate counsel some "job security" or tenure—a requirement that all resignations or dismissals of attorneys be explained to boards of directors, to the Securities and Exchange Commission, or to shareholders. *See, e.g.*, the question raised by Professor Cary in a panel discussion in ASS'N OF THE BAR OF THE CITY OF NEW YORK, PROFESSIONAL RESPONSIBILITY OF THE LAWYER 44 (N. Galston ed. 1977). *See also* Kramer, *Clients' Frauds and Their Lawyers' Obligations: A Study in Professional Irresponsibility*, 67 GEO. L.J. 991 n.2 (1979); Rotunda, *Law, Lawyers, and Managers in AMERICAN ASSEMBLY, THE ETHICS OF CORPORATE CONDUCT* 127, 135-37 (C. Walton ed. 1977). The assumption behind this suggestion is that the need to explain resignations and dismissals would be an embarrassing enough prospect to prevent the improper pressures that sometimes lead to these things but would not unduly deter resignations and dismissals for legitimate reasons.

While this alternative form of "limited tenure" might be as effective as Professor Kalish's from a deterrence standpoint and might even be easier to administer, it does nothing to compensate the lawyer who is discharged for improper reasons. Professor Kalish's proposal may therefore be preferable from a fairness standpoint.

lem of the lawyer who derives all his professional income from one client-employer, whether or not that client is an organization. Defining the problem this way leads me to question Professor Kalish's classification of the lawyers to be protected by limited tenure.

Norms that define the lawyer's professional role can often be understood in terms of two conflicting societal interests. Society is interested both in having lawyers zealously and effectively pursue their client's ends and in having lawyers preserve the integrity and efficacy of the legal system. Some provisions of the Code obviously promote the first interest, some the second. For example, DR 4-101(B) of the Code requires that a lawyer preserve clients' confidences, for to do otherwise disserves the interest in effective representation;³ DR 7-102(A) (4) prohibits a lawyer from using perjured testimony on behalf of a client, for to do so would undermine the judicial fact-finding process.⁴

Clients, one may suppose, tend to be more directly concerned with attaining their personal objectives than with preserving the integrity of the legal system. For this reason, the type of professional norms a lawyer is most likely to violate may vary with the influence clients have over him; the greater the influence, the more likely it becomes that the lawyer will violate norms intended to protect the integrity of the legal system. Client influence, in turn, may vary significantly with the economic structure of lawyer-client relations. At the structural extremes I am about to describe, a serious imbalance is possible between the pressures upon a lawyer to serve a client effectively and the pressures to uphold the integrity of the legal system.

At one structural extreme is the relationship between a lawyer and a "one-shot" client (*i.e.*, a client the lawyer is representing on an isolated matter and is not likely to represent again), especially when it is not the client who pays the lawyer and when no one closely monitors the lawyer's performance on behalf of the client.

3. ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANONS, No. 4, DR 4-101(B) (1978):

....

(B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:

- (1) Reveal a confidence or secret of his client.
- (2) Use a confidence or secret of his client to the disadvantage of his client.
- (3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

4. ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANONS, No. 7, DR 7-102 (A) (4) (1978): "(A) In his representation of a client, a lawyer shall not: . . .

(4) Knowingly use perjured testimony or false evidence."

The relationship between an indigent criminal defendant and assigned counsel is an example. Given his weak ties to the client, if counsel violates a professional norm it is likely to be one that is designed to assure zealous or effective representation—for example, DR 6-101(A)(2), proscribing the handling of a case without adequate preparation⁵—rather than a norm intended to curb “overzealous” representation. The risk of such indifferent representation in lawyer-client relations that are structured this way is serious enough that special measures to certify lawyers to participate on assigned counsel panels have been proposed.⁶

At the other structural extreme is the relationship involving a lawyer whose economic fortunes are very closely tied to a particular client. House counsel to a corporation is surely an example. Unlike the case of assigned counsel, there is no structural reason to worry that house counsel will be an indifferent representative. The dangers are in the other direction. House counsel may be unduly influenced to violate norms that stand in the way of the client's personal objectives because the client, as the sole source of the lawyer's professional income, has extraordinary power over him.

In principle, this power to corrupt exists whether the client-employer is an organization or not. In practice, of course, it is normally only an organization that can generate legal business on a scale that allows it to be a single client or even a very significant one. Nearly all one-client lawyers represent either corporations, unions, business associations, foundations, or other organizations, rather than individuals. In this special sense, organizations have what might be termed a comparative advantage in corrupting lawyers to attain their own ends. But this is the only clear connection between a client's organizational status and a lawyer's tendency to violate professional norms that are meant to preserve the integrity of the legal system.

III. THE CLASS OF LAWYERS TO BE PROTECTED BY LIMITED TENURE

If the problem of the single-client lawyer is what Professor Ka-

5. ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANONS, No. 6, DR 6-101(A)(2) (1978): “(A) A lawyer shall not: . . . (2) Handle a legal matter without preparation adequate in the circumstances.”

6. See, e.g., National Center for Defense Management, (State of Wisconsin) A Proposal for Competency Certification of Private Attorneys on Assigned Counsel Panels (LEAA Grant #77-DF-99-0054) (June 1978). This proposal suggests not only that lawyers be screened for the requisite skill and experience before being certified for assigned counsel duty, but also that the monitoring agency review the performance of panel members from time to time and, where necessary, institute disciplinary proceedings against panel members.

lish's proposal is (or should be) aimed at, then his classification of all lawyers employed by private organizations as entitled to protection is both under- and overinclusive.

The classification is underinclusive not because it excludes one-client lawyers whose employers are not organizations—a negligible category—but because it ignores government lawyers. Substantially more single-client lawyers are employed by public agencies than by private organizations.⁷ To be sure, some government lawyers hold civil service posts and already enjoy a form of tenure that probably protects them from being fired for complying with professional norms.⁸ But most government lawyers have no job security and it is hard to see why they are less in need of protection than private house counsel. It would be naive to assume that because their superiors lack a profit motive they also lack an incentive to corrupt; political advancement and the attainment of program objectives are not unheard of as bureaucrats' motives for pressing a lawyer to misbehave.

How might the class that Professor Kalish would protect be overinclusive? Again, if the problem being addressed is that of the single-client lawyer, it is not clear why limited tenure should be extended to associates in law firms that represent many clients. The inclusion is curious from an historical standpoint because the modern law firm, especially the large firm, may reasonably be viewed as a development which, more than any other, preserves for lawyers a degree of professional autonomy from large and powerful clients. From a structural standpoint, a firm that bills one client a million dollars a year but has a gross income of twenty million dollars would seem better able to fend off improper client demands than one which works exclusively for the million dollar client. Even if the law firm gains a degree of professional autonomy from clients at the expense of its lawyers' autonomy from one another, it is dubious history to interpret the development of this institution as a threat to professionalism.

The inclusion of law firm associates among the lawyers to be protected by limited tenure is questionable from an analytical standpoint as well. It is true that a firm associate who is instructed

7. Among lawyers in active practice in 1970, 11.1% were employed by government agencies and 10.3% were employed by private concerns other than law firms. AMERICAN BAR FOUNDATION, THE 1971 LAWYER STATISTICAL REPORT 10-12 (1972).

8. A useful study could be done of the extent to which government lawyers who have some job security are freed from pressures to misbehave. If they are no less likely to breach professional responsibilities than their unprotected counterparts in government service, one may predict that limited tenure will not go far toward improving the ethical quality of the behavior of privately employed lawyers.

to do something she regards as professionally improper is in an extremely uncomfortable position. Moreover, since the associate's professional income comes entirely from the firm, she is as vulnerable as house counsel would be to pressure to misbehave. But the analogy ends here. Professor Kalish acknowledges that a law firm's partners, as lawyers, are more likely than house counsel's superiors to take professional norms into account when instructing their employee. One might add that firm partners are more likely than business executives to be correct in any dispute with an employed lawyer over her professional responsibilities.

There is, in addition, a profound distinction between the law firm and the in-house practice setting. One characteristic of law firm practice is that it requires lawyers to make ethical judgments collectively. While it is true that solo practitioners need not accommodate their views on issues of professional responsibility to the views of others, and that a much larger percentage of the bar formerly practiced alone, it does not follow, as Professor Kalish implies, that the need to resolve issues collectively is at odds with the professional role of lawyers. On the contrary, for lawyers practicing together in a firm, even as equal partners, this need has long been an implicit aspect of their role. When a client "hires" a firm, all the firm's partners assume important responsibilities, even beyond their potential civil liability to the client. Among other things, the partners have a professional duty to supervise their associates.⁹ If an associate's work on a case raises a question of professional responsibility, the partners would be remiss if they did not address the question and develop a position on the issue for the firm.

This supervisory responsibility takes on a special poignancy in the not infrequent situation in which an associate proposes to behave in a way she thinks is required by the Code but the partners believe is inconsistent with the Code. Suppose, for example, that on the basis of an interview with a prospective witness an associate is convinced that her client has perpetrated a fraud on a court. The associate believes, in light of DR 7-102(B)(1) of the Code, that

9. It has been reported that the supervisory obligations of firm partners will be explicitly recognized in the tentative draft of a new Code that is currently being prepared by an ABA committee. Tentative Rule 7.2(b) is reportedly phrased as follows:

For purposes of professional discipline, a lawyer having supervisory responsibility over another lawyer is chargeable with violation of the rules of professional conduct by the lawyer under supervision if the supervising lawyer: ordered or ratified the conduct involved; or has knowledge of the conduct at a time when its consequences can be avoided or mitigated, and fails to take appropriate remedial action.

Quoted in NAT'L L.J., Aug. 27, 1979, at 12.

the fraud *must* be revealed to the court.¹⁰ But the senior partner, while acknowledging the fraud, believes that it must *not* be revealed because it is known only on the basis of a "privileged communication" within the meaning of the rule.¹¹ The associate disagrees, asserting that the relevant information did not come to the firm in a privileged communication. It is not apparent how the partner, who has the ultimate responsibility to decide on a course of action, can properly allow the associate's position to prevail. And if the associate cannot accept the firm's ultimate resolution of the problem, the ABA's Committee on Ethics and Professional Responsibility, an influential interpreter of professional obligations, has already determined that she has an obligation to "withdraw."¹²

If in this context "withdraw" means "quit the firm," as is plausible,¹³ it is difficult to see how the associate has been injured if she happens to be fired before fulfilling her duty to quit. But even if one considers the duty to quit under these circumstances as itself a form of discharge, or even if the associate is not obliged to quit and is fired, the arguments for limited tenure may not apply here. As a matter of fairness, it is not obvious that the firm should have

10. ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANONS, No. 7, DR 7-102(B) (1) (1978):

.....

(B) A lawyer who receives information clearly establishing that:

- (1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal, except when the information is protected as a privileged communication.

11. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 341 (1975) (source of the firm's knowledge was a privileged communication within the meaning of DR 7-102(B)(1)).

12. ABA COMM. ON PROFESSIONAL ETHICS, INFORMAL OPINIONS, No. 1203 (1972).

13. The Code requires a lawyer to withdraw from representation "when he knows . . . that his continued employment will result in violation of a Disciplinary Rule." ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANONS, DR 2-110(B)(2) (1978). Construing this rule to refer only to withdrawal from the particular matter rather than from all representation of the client or from the firm that represents the client, while desirable from the lawyer's financial standpoint, would have a number of unfortunate consequences. It would make the potential for withdrawal a less significant deterrent to client or firm misbehavior than it otherwise would be. In addition, there is a danger that a lawyer who withdraws from handling a particular matter so that the matter can be handled by others in a way he regards as professionally improper is being corrupted and will be less likely to register ethical objections to improper behavior in the future. Finally, allowing "case-withdrawal" rather than complete withdrawal makes it too easy for lawyers in a firm to avoid reaching collective decisions on ethical problems. Instead, in each case the firm could simply "bench" those lawyers who have ethical qualms about the preferred course of action.

to pay damages that result ultimately from an action the senior partner felt compelled to take as a matter of professional responsibility. From the standpoint of promoting ethical behavior, even if the associate's position in the dispute turns out to be correct, there is little to be served by making the firm liable if its mistake was made in good faith:¹⁴ little, that is, unless one can prove, as Professor Kalish does not, that in such disputes associates are more often right than partners. Since partners tend to have more experience than associates with issues of professional responsibility, I see no reason to assume this to be the case. One may argue that partners are more sensitive to firm profits and therefore are biased toward "overzealous" representation in interpreting their professional duties. But this argument requires empirical support which does not now exist.

I do not pretend to have proven that as applied in a law firm context limited tenure would have a negative effect on the ethical quality of lawyers' behavior. But I hope I have said enough to show that the case for recognizing wrongful discharge claims in the firm context is much less clear than in the lay employer situation.

IV. LIMITS ON THE APPLICABILITY AND EFFECTIVENESS OF LIMITED TENURE

Professor Kalish does not assert that limited tenure, as proposed, would significantly restructure relations between lawyers and their employers or substantially affect the ethical quality of lawyers' behavior. He is silent on the question. But there are good reasons to believe that limited tenure would have little effect and these should be noted.

First, employers who are disturbed by an attorney's disloyalty have many ways of manifesting their displeasure besides discharge—demotions, paltry salary hikes, increased workloads and similar indignities are readily available substitutes. As with efforts to provide job security for other kinds of employees, cumbersome grievance machinery to deal with all these sanctions may be needed to protect lawyers and effectively deter employers. Without this machinery a right to sue for wrongful discharge, even if applicable to a broad range of potential discharge situations, might be insignificant.

14. In saying this, I am conceding to Professor Kalish the desirability of recognizing an associate's right to sue for wrongful discharge when the associate can show that the firm's position in the dispute was wrong *and* was asserted without a good faith belief in its validity. Professor Kalish would go further and allow recovery whenever the associate's position turned out to be correct.

Second, limited tenure, as proposed, would probably apply to only a small percentage of those cases in which lawyers are actually fired for disloyalty. According to Professor Kalish, a lawyer should be protected only from a discharge "based *merely* on the fact that he was disloyal, when the disloyal acts or omissions constituted mandated professional conduct; that is, when the acts or omissions were *required* by the professional role."¹⁵

For wrongful discharge purposes, when should behavior be said to be "required" by the professional role? The only significant body of professional norms that lawyers are required to follow for other purposes are the Disciplinary Rules of the Code. These are requirements in two senses: they are characterized in the Code itself as "minimal standards" and they have been officially adopted in most states as legal grounds for discipline. Attorneys' *legal* obligations for disciplinary purposes would seem to be the only sensible "requirements" for wrongful discharge purposes too. Using Professor Kalish's own analysis, there is no warrant for including as "requirements" the Code's more copious Ethical Considerations, which the Code itself characterizes as merely "aspirational" in character. If employers are to remain free to fire lawyers who are disloyal out of personal, political or moral conviction, as Professor Kalish insists, then should they not also remain free to fire a lawyer who acts on the basis of a norm that both the organized bar and those who regulate lawyers have explicitly refused to treat as legally binding?

Moreover, it is implied by Kalish, that only the lawyer fired for obeying a DR that serves to protect the integrity of the legal system is to be protected. But the distinction between these DRs and others is far from clear and the protected category may be surprisingly small. Professor Kalish mentions the case of house counsel who is instructed "to negotiate directly with a . . . competitor whom the attorney knows to be represented by counsel."¹⁶ Such behavior would indeed violate DR 7-104(A)(1) of the Code.¹⁷ It is arguable, however, that this rule serves not to protect the integrity of the negotiation process (by insulating unsophisticated parties

15. Kalish, *The Attorney's Role in the Private Organization*, 59 NEB. L. REV. 1, 5 (1980) (emphasis added).

16. *Id.* at 4.

17. ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANONS, No. 7, DR 7-104(A)(1) (1978):

(A) During the course of his representation of a client a lawyer shall not:

(1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

from overbearing attorneys), but to protect the personal and financial interests of attorneys (by assuring attorney control of cases).¹⁸ Indeed, it has been argued that *many* Code provisions cannot be rationalized in terms of either client's interest in zealous representation or society's interest in the integrity of the legal system and instead, must be understood to serve the private interests of lawyers.¹⁹ Presumably, attorneys who insist upon upholding such rules would not be protected by limited tenure.

Finally, when should it be said that a lawyer has been fired "merely" for disloyalty? When, to put the question in tort terms, is disloyalty the proximate cause of a discharge? This question brings into focus an important issue—whether there is a good policy reason to insulate the employer from liability even in some cases where the appropriate kind of disloyalty has been a factor in the firing. Consider, in this connection, the case of a corporation that is being defended on criminal antitrust charges by a team of lawyers that includes house counsel. In a momentary lapse of judgment, the company president hints to house counsel that he wants the lawyer to try to convince the team to use testimony at trial that the lawyer knows will be perjured. The lawyer refuses and, as a result of this embarrassing scene, relations between the president and house counsel deteriorate; communication of any kind becomes difficult and the lawyer's usefulness to the company, even for totally legitimate purposes, is substantially impaired. If the lawyer is fired, has he been fired "merely" for disloyalty?

To answer affirmatively, thereby allowing the lawyer to recover, is to make it more costly for the corporation to have effective representation of counsel—representation, that is, by counsel with whom corporate officers can be comfortable and candid—both in the particular criminal case in which the problem arose and in other matters as well. One might argue that the constitutional right to effective representation in the criminal case has become more costly to exercise only because the president tried improperly to corrupt house counsel. Therefore, to the extent of having to incur wrongful discharge liability in order to exercise the right, it has been waived. But are we normally so niggardly in construing the constitutional rights of criminal defendants? In the alternative, one might assert that the company could have protected its constitutional right to effective representation in the antitrust and any future criminal cases by keeping house counsel off of these

18. For a recent critique of the rule, see Leubsdorf, *Communicating with Another Lawyer's Client: The Lawyer's Veto and the Client's Interests*, 127 U. PA. L. REV. 683 (1979).

19. See generally Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702 (1977).

rather than firing him altogether, so that nothing is lost by allowing the lawyer's wrongful discharge claim. The difficulty with this position is that although effective representation is only a constitutional value in criminal cases, it is nonetheless a value in all.

This example shows, I think, that in order to fully appreciate the values at stake in creating a tort of wrongful discharge, one must look beyond limited tenure as a prophylactic measure that prevents the employer from pressing counsel to do anything improper in the first place. One must think of limited tenure as a deterrent to firing when pressure to behave improperly has already been applied and has forced a lawyer to act in a way the employer considers disloyal. The broad enforcement of limited tenure in these situations will disserve the value of effective representation because once an incident has occurred between lawyer and client, the likelihood of effective representation is reduced. The more weight one attaches to this value, the fewer the cases in which it will seem appropriate to say a lawyer has been fired "merely" for disloyalty.

Thus, there are a number of reasons to predict—perhaps even hope—that the elements of the proposed tort of wrongful discharge would rarely be satisfied. Limited tenure, as proposed, could only be a very modest factor in any restructuring of relations between lawyers and their employers.

V. THE SUFFICIENCY OF LIMITED TENURE AS A RESPONSE TO THE PROBLEM OF THE ONE- CLIENT LAWYER

The modest effect that limited tenure is likely to have is no reason to reject the concept. But it is a reason to think about alternative or supplementary ways to encourage one-client lawyers to properly fulfill their duty to uphold the integrity of the legal system. Professor Kalish's discussion may inadvertently hinder such thinking by defining the conceivable alternatives or supplements too restrictively. "Instead of *dramatically* changing the organizational model [so that organizations no longer expect loyalty from their employees] or *completely restructuring* the professional model [so that lawyers are no longer expected to uphold the integrity of the legal system]," he says, "why not leave them essentially as they are but provide the attorney . . . tenure. . . ." ²⁰ The choice, in other words, is presented as one between utter impracticality, total surrender, or limited tenure. So extreme a definition of the options is not only unfortunate, it is unnecessary to Professor Kalish's thesis. For it may well be that both employer and profes-

20. Kalish, *supra* note 15, at 4 (emphasis added).

sional expectations can be tinkered with, though not radically altered, in ways that place the one-client lawyer more squarely in the business of upholding the integrity of the legal system *and* strengthen the case for limited tenure. Let me suggest a few such tinkering.

One may argue, first of all, that professional expectations are actually *not enough* in tension with the expectations of client-employers. It is a mistake to assume that organizational and professional expectations have completely independent sources and that existing professional norms necessarily give the lawyer's duty to uphold the integrity of the legal system its due. The same client pressures that can influence the behavior of lawyers in particular situations may indirectly influence the very formulation of professional norms, biasing those norms toward the goal of zealous representation. For example, it has long been recognized that legal and administrative processes might be served by a rule of professional responsibility that barred lawyers from sitting on the board of directors of corporations that they represent. But the frequency of the practice, which is ultimately a function of client wishes, rather than any principled argument on the merits, has apparently prevented the adoption of such a rule.²¹ Similarly, in the interest of protecting the integrity of the legal process, lawyers might reasonably be assigned a professional responsibility to disclose frauds a client has perpetrated on a tribunal whenever this knowledge is not based on information that is confidential within the meaning of the attorney-client evidentiary privilege. Yet DR 7-102(B)(1) of the Code, requiring revelation of a fraud whenever the attorney's knowledge is not based on a "privileged communication," has been construed by the ABA Committee on Ethics and Professional Responsibility to bar disclosure even when the attorney's knowledge is based on a mere "secret." Secrets, unlike confidences, may be matters of public record and, according to the Committee, need not even have been communicated to the lawyer by the client.²² So broad an exemption from the duty to disclose client frauds is hard to justify in terms of society's interest in promoting sufficient candor between lawyer and client to assure effec-

21. One well-known corporate lawyer expressed the problem this way:

Frequently corporate clients insist that their counsel shall sit as directors upon their boards. . . . I believe that most of us would be greatly relieved if a canon of ethics were adopted forbidding a lawyer in substance to become his own client through acting as a director or officer of a client. But the practice is too widespread to permit any such expectation.

Swaine, *Impact of Big Business on the Profession: An Answer to Critics of the Modern Bar*, 35 A.B.A. J. 89, 170 (1949).

22. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 341 (1975).

tive representation. One may reasonably assume that the rule is being construed this way ultimately because clients wish it so.²³

While it is evident that professional norms sometimes defer too greatly to client interests at the expense of the integrity of the legal system, it is not inevitable that they do so. The Code of Professional Responsibility is currently being revamped and it is possible that a new Code will weigh the public's interest in the integrity of the legal system more heavily,²⁴ provided the process in which the Code is developed is structured so that this interest can be forcefully represented. But of course a Code that gives greater weight to this duty is likely to heighten the tension between client and professional expectations. If so, the case for limited tenure will have been strengthened.

With respect to client-employers' expectations of loyalty, small changes may also be possible which will improve the ethical quality of lawyers' behavior. One intriguing possibility is to use externally imposed rules to redirect, rather than reduce, the lawyer's loyalty within the employing institution. In 1978, for example, the Institute for Public Representation petitioned the Securities and Exchange Commission to adopt a rule requiring boards of directors to certify to the Commission that their lawyers have been instructed to report to the board any illegal corporate activities they discover.²⁵ Without such a rule, house counsel's loyalty to the corporate officers who control his employment may stand in the way of such reporting. With such a rule, counsel will have a specific reporting obligation that runs to the board. Of course the disclosure of illegal activities to the board is not a practice that all corporations would encourage voluntarily; among other things, such

23. I might report here one additional and particularly blatant example of large-employer influence in the formulation of lawyers' professional norms. In Wisconsin, the Code has been amended to include a unique rule, DR 5-107(D), which provides that: "A lawyer who is regularly employed shall not accept professional employment if such professional employment will conflict with the interests of, or the lawyer's loyalty to, his employer except . . . with the prior consent of the employer."

The rule is not intended to protect *clients*. The rule protects those who employ lawyers as teachers or in other non-professional capacities. The rule was adopted after, and clearly in response to, a case in which a law professor undertook to represent another university employee who had a grievance against their mutual employer. Why a law professor's loyalty to the university that employs him to teach should not be a matter of contract between them rather than an issue of professional responsibility remains a mystery.

24. It has been reported that the new Code being drafted by the ABA Commission on the Evaluation of Professional Standards will "radically broaden a lawyer's duty to disclose unethical conduct by a client." NAT'L L.J., Aug. 27, 1979, at 12, col. 1. It is likely that this expanded duty will include a duty to reveal client frauds even when known through privileged communications.

25. See Kramer, *supra* note 1, at 999 n.2.

disclosures may lead to embarrassing leaks of information. In a sense, therefore, an externally imposed rule requiring lawyers to disclose illegal activities to the board only creates one more professional duty, the fulfillment of which both house counsel and corporate officers would view as an act of disloyalty. If so, and if such a rule is adopted, the case for limited tenure will again be strengthened.

In short, employer and professional expectations can conceivably be adjusted in ways that promote lawyer behavior which upholds the integrity of the legal system. Such modifications are not necessarily substitutes for limited tenure, they may even strengthen the case for it.

VI. THE CONSISTENCY OF LIMITED TENURE WITH CURRENT PROFESSIONAL NORMS

There is a certain irony in Professor Kalish's proposal. He suggests the creation of a new right that will allow lawyers to better fulfill the role that is defined for them by professional norms. Yet the exercise of this right would arguably be inconsistent with the lawyer's role as it is presently conceived in the Code. Several Code provisions might be breached by a lawyer in pursuing a wrongful discharge claim. These provisions might have to be amended or at least clarified as they apply to lawyer-employees in order to make wrongful discharge claims permissible. If amendments are necessary and if recognition of a lawyer's right to sue for wrongful discharge seems desirable on other grounds, then the amendments should be made. My purpose here is to point out the changes that might be needed.

DR 2-110(B)(4) of the Code requires a lawyer to withdraw from representing a client whenever "he is discharged by his client." The rule might be read to give the client an absolute right to discharge a lawyer with impunity and to be inconsistent with a claim for "wrongful" discharge. Strictly speaking, a rule which on its face requires a lawyer to honor a client's request to stop representing him is not necessarily inconsistent with a lawyer's right to sue the client for damages when the lawyer is fired for a specific, improper reason. But what lies behind the lawyer's obligation to withdraw whenever discharged? Arguably it is a deeply ingrained attitude that lawyers gain whatever power they have to control their own work and to appeal to clients' best instincts by treating their continued representation as a matter of indifference and completely at the clients' sufferance. "Get rid of me whenever you wish, but as long as I am your lawyer I insist that . . ." is a homely way of expressing this attitude. If a right to sue for wrongful discharge is not necessarily inconsistent with DR 2-110(B)(4) on its

face, it is at odds with the rule construed as an embodiment of this attitude. But of course it is precisely this attitude of professional indifference to the economic aspects of law practice that cannot be credibly maintained in an employment setting. For the single-client lawyer, the power to control his work and to appeal to the client's better instincts, if it exists at all, exists despite the fact that the lawyer can be discharged with impunity, not because of it. There is, therefore, no good reason to allow DR 2-110(B)(4) to stand in the way of wrongful discharge claims. If necessary, it should be made clear that the rule does not stand in the way.

A more serious problem is presented by the Code's rules concerning the preservation of a client's confidences and secrets. It is difficult to see how house counsel could sue a former employer for wrongful discharge without at least using secrets—"information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client."²⁶ In most circumstances a lawyer is barred from using secrets without the client's consent. DR 4-101(C)(4) does provide that "a lawyer may reveal confidences or secrets necessary to . . . collect his fee or to defend himself . . . against an accusation of wrongful conduct." But does this exception cover the use of secrets in wrongful discharge suits?

A tort suit for wrongful discharge is hardly a claim for a fee. The claim for a fee is based on specific contractual rights or seeks reasonable payment on a *quantum meruit* basis for work already performed. Lawyers are already entitled to bring meritorious claims against clients on these theories, and Professor Kalish clearly has some additional protection in mind in proposing that wrongful discharge claims be recognized. Nor is it sound to construe a wrongful discharge suit as a response to an action—discharge—that carries an implicit accusation of wrongdoing. To be sure, an affirmative claim can be a way of "defending" oneself against an accusation; many defamation suits are just such claims. The problem with construing a discharge as an implicit accusation is this: if dismissing a lawyer constitutes an accusation of wrongdoing, then, on the basis of DR 4-101(C)(4), lawyers dismissed by any clients for any reasons would be entitled to publicize client secrets to vindicate themselves. This would be true whether or not there were grounds for a wrongful discharge suit. Reading the exception this broadly would have unfortunate results.

While DR 4-101(C)(4), as written, may be an obstacle to wrongful discharge claims, there is a good reason why the rule should be

26. ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANONS, No. 4, DR 4-101(A) (1978).

changed in a way that removes the obstacle. Pre-Code authority²⁷ suggested that a lawyer should be able to use confidential and secret information whenever it is necessary to protect any "rights" against a client arising out of the lawyer-client relationship. The Code's approach, limiting use of secrets to fee actions and defenses against accusations, seems unwisely to allow the client to use his right of confidentiality as a shield against liability for violating certain rights that have been, or arguably should be, given to lawyers. The right to sue for wrongful discharge is not the only right in this category. Another example might be the right to recover for sex-based or racial discrimination in promotions or pay.²⁸ If DR 4-101(C)(4) were amended to allow lawyers to use confidences and secrets to pursue all rights against the client arising out of the lawyer-client relationship, as it should be, the rule would no longer be an obstacle to wrongful discharge claims.

VII. SUMMARY

While parts of Professor Kalish's analysis in support of limited tenure for lawyers are subject to criticism, the concept itself seems to me to be worth further consideration. My remarks go to some of the factors that should be taken into account in any such consideration and that are not developed in Professor Kalish's treatment. Part II suggested that limited tenure be understood as a response to a structural problem in lawyer-client relations—the problem of the single-client lawyer. Part III argued that limited tenure might sensibly be given not only to private house counsel but also to those lawyers for government agencies who presently lack job security. Part III also contended that the case for granting limited tenure to associates in private law firms has not yet been made. Part IV was meant to show that the wrongful discharge remedy, as proposed, would rarely apply and would probably do little to restructure relations between lawyers and their employers. Part V suggested that incremental changes are possible in both employ-

27. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 250 (1943):

[A] lawyer may disclose confidential communications in subsequent litigation between the attorney and client where it becomes necessary so to do to protect the lawyer's rights. The general rule should not be carried to the extent of depriving the lawyer of the means of obtaining or defending his own rights.

28. The issue of whether a lawyer may use confidential or secret information in pursuing a claim for sex-based discrimination against a company that employs her in a professional capacity was noted but not resolved in *Hull v. Celanese Corp.*, 513 F.2d 568 (2d Cir. 1975). The court did hold, however, that the attorney who represents the claimant in such a discrimination suit should be disqualified from representing others with similar claims against the company for fear that confidential or secret information will be used on behalf of the others.

ers' and professional expectations which would encourage lawyers to give greater emphasis to society's interest in preserving the integrity of the legal system. Part V also suggested that these changes would not necessarily be inconsistent with limited tenure and might even strengthen the case for it. Finally, Part VI contended that wrongful discharge claims might themselves be inconsistent with existing professional norms but concluded that if, as a matter of policy, wrongful discharge claims should be recognized, these norms could easily be changed to make claims permissible. Changes were suggested which would not sacrifice other important values.